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No. 85-82

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT, ALTEMOSE CONSTRUCTION COMPANY.

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QUESTIONS PRESENTED.

1. May the Court of Appeals reinstate an antitrust claim dismissed by the district court for lack of proof of a conspiracy where, after conducting a plenary review of the summary judgment record, the Court of Appeals finds sufficient evidence of a concert of action among petitioners and non-union entities, as well as circumstantial evidence of conduct which is "*prima facie*" contrary to the economic self-interest of the co-conspirators?

2. Does the doctrine of collateral estoppel preclude proof in an antitrust conspiracy case that the activities of labor unions in furtherance of the conspiracy beginning in 1971 had no organizational or recognitional intent where the National Labor Relations Board found an organizational purpose for the labor unions' picketing only during the first four months of 1975?

3. In light of this Court's decision in *Connell Construction Co. Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), does the statutory exemption to the antitrust laws in Sections 6 and 20 of the Clayton Act, 15 U.S.C. §§17 and 29 U.S.C. §52, preclude an antitrust claim against combinations of labor unions in the construction industry which, in seeking a subcontractors' agreement from a general contractor with which they have no collective bargaining relationship, do not act in their own self-interest but rather on behalf of a favored group of unionized contractors/employers?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

In addition to the parties listed on pages ii and iii of the Petition, the Associated Builders and Contractors, Inc. is a co-plaintiff in the district court which withdrew its appeal prior to the decision of the Court of Appeals for the Third Circuit.

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BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY *et al.*,
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BRIEF IN OPPOSITION OF RESPONDENT, ALTEMOSE CONSTRUCTION COMPANY.

Respondent, Altemose Construction Co. ("Altemose"),[1] respectfully requests that this Court deny the

1. Altemose Construction Co. is a Pennsylvania corporation, which is wholly owned by Altemose Enterprises, Ltd., a closely held Pennsylvania coporation.

petition for writ of certiorari, seeking review of the Third Circuit's opinion in this case reported at 751 F.2d 653.

JURISDICTION

Except that the decision of the Court of Appeals was rendered on January 8, 1985, petitioners' jurisdictional statement is not disputed.

STATUTES AND RULES INVOLVED.

In addition to the references made on p. 2 of the Petition, this case also involves a request for declaratory relief pursuant to 28 U.S.C. §§ 2201-02 (1982), treble damages pursuant to 15 U.S.C. § 15 (1982), and injunctive relief pursuant to 15 U.S.C. § 26. These provisions are reproduced in the Supplemental Appendix following this Brief.

STATEMENT OF THE CASE.[2]

Altemose is a non-union, general contractor engaged primarily in the construction of commercial properties in the Philadelphia area.[3] Altemose regularly employs approximately 150 employees who perform various construction trades (*i.e.*, carpenters, painters, laborers, etc.) and who do not belong to any union. Prior to 1971,

2. This Petition is the second attempt by these petitioners to seek review by this Court of Altemose's antitrust claims prior to a trial on the merits. In 1974, the Third Circuit refused to grant Petitions for Writ of Prohibition and Mandamus asking for a reversal of the district court's decision denying petitioner's motions to dismiss the Complaint. *Building & Construction Trades Council of Philadelphia and Vicinity, et al. v. A. Leon Higginbotham, Jr., Judge*, Nos. 74-1756 and 74-1772. Petitions for a Writ of Certiorari (Nos. 74-412 and 74-557) were denied by this Court on January 27, 1975. 420 U.S. 908 (1975).

3. As accepted in the Third Circuit and district court, the relevant product market is construction services, and the relevant geographic market includes the Pennsylvania counties of Philadelphia, Delaware, Bucks, Montgomery and Chester.

Altemose subcontracted much of the work on its construction projects to independent subcontractors, over half of which had employees represented by various construction trades unions, which were members of the Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO ("Council").

Beginning in 1971, the Council sought from Altemose a "standard sub-contractors agreement" requiring Altemose to employ only union labor on its construction projects and to subcontract work only to subcontractors who employ union labor. (App. 6a-7a.) The Council had obtained similar agreements from over 400 general and subcontractors in the Philadelphia area. (App. 4a.) The Council and its member unions expressly disclaimed any interest in organizing Altemose's employees and stated that they would not accept Altemose's employees as union members, thereby requiring Altemose to discharge its 150 employees and replace them with union members in the employ of union contractors. (R. 506, 531-32, 633-34, 652-58, 659-661, 665.)[4]

The General Building Contractors Association ("GBCA") is an association of building contractors who have collective bargaining agreements with trade unions which are members of the Council. (App. 4a.) Both by agreement and as a result of years of practice, individual members of the GBCA do not enter into agreements with non-union subcontractors. If any member strayed from that policy, the GBCA, at the urging of the Council, would contact the errant contractor, which cured the situation by removing the non-union contractor from the construction job. Moreover, the Council authorized the picketing of any GBCA member who employed a non-union contractor. The Council also published a list of all unionized contractors and subcontractors (so-called

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4. References to "R" are to the extensive Appendix (4,373 pages) reviewed by the Court of Appeals.

"fair" contractors). The cumulative impact of the conduct of the Council, its member unions, and GBCA was that over 90% of the construction work in the Philadelphia area was performed by contractors listed in the Council's directory.

To induce Altemose to sign the subcontractor's agreement, the Council offered to supply Altemose with unionized subcontractors who would work at the lower, non-union contract price, even where those same subcontractors previously submitted higher bids. (R. 614, 1078, 1096-1109, 1113-1121.) Altemose refused to sign the Council's standard sub-contractors agreement. The Council then initiated a campaign of direct intimidation and secondary pressure, including threats of violence and actual violence such as the destruction of an Altemose construction jobsite by a "virtual military assault" on June 5, 1972, described by the Third Circuit in its discussion of the summary judgment record. (App. 6a-10a.) These actions were taken in the complete absence of any legitimate labor dispute between the Council and Altemose and of any collective bargaining relationship between Altemose and the Council or its member unions. The net effect of these circumstances was, and continues to be, to exclude Altemose and other non-union contractors from competing with union contractors for commercial construction projects in Philadelphia area.

In order to prevent the Council from unlawfully precluding access to that market, without sacrificing long-standing employees and the ability to obtain subcontractors and suppliers at the lowest competitive price, Altemose in 1973 filed its complaint alleging in Count I an antitrust conspiracy among the Council, its members and members of the GBCA, and in Count II an antitrust conspiracy only among the Council and its members, to restrain trade and monopolize the market for construction services in the Philadelphia area in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.

1 and 2, and seeking declaratory and injunctive relief, as well as treble damages. As found by the Third Circuit, the foregoing is supported by the summary judgment record and there are genuine issues of material fact relating to the existence of the antitrust conspiracy and the application of the non-statutory labor exception to the antitrust laws to warrant a trial on the merits of Altemose's claims.

REASONS WHY THE WRIT SHOULD BE DENIED.

I. THE THIRD CIRCUIT'S DECISION AS TO COUNT I, FOLLOWING PLENARY REVIEW OF THE COMPLEX SUMMARY JUDGMENT RECORD IS CONSISTENT WITH THE STANDARDS PROMULGATED BY THIS COURT, ON COUNT I TURNS ON THE UNIQUE FACTS PRESENTED BY THIS CASE.

Petitioners suggest that the standard used by the Third Circuit to evaluate the summary judgment record on Count I should be reviewed because this Court has recently granted certiorari on a question of the sufficiency of evidence of an antitrust conspiracy in a "parallel acts" case, *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983). *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 83-2004). But the factual predicate for the legal question to be decided in *Matsushita* is simply lacking in this case, and the petitioners' invitation for this Court to canvass the lengthy summary judgment record is not important enough to merit this Court's discretionary jurisdiction.

The only reference to *Japanese Electronic Products* in the Third Circuit's opinion was in support of a general statement of the standard to be followed in reviewing the summary judgment record:

> "This Court recently outlined the legal standard governing sufficiency of evidence of conspiracy. We noted that the court must examine all admissible evidence, direct and circumstantial, in order to determine whether a trier of fact could reasonably infer concert of action." (App. 5a.)

There is no error in this statement for it follows the oft-repeated, long-standing observations by this Court that permissible inferences of an antitrust conspiracy arise from the totality of the circumstances without compartmentalizing or fragmentizing the factual matrix and viewing each component in isolation. *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 698-99 (1962); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223 (1939).

The Third Circuit, applying these well-established principles, held that the district court erred in failing to analyze as a whole the factual record for evidence and permissible inferences of an antitrust conspiracy among the Council, its member unions and non-labor entities (e.g. contractors, users of construction services, suppliers, insurance companies providing construction bonds, etc.), and to include in the overall conspiracy equation the significant probative evidence favorable to the existence of such a conspiracy. Of the sixty-five (65) pages of its "Memorandum of Decision," the district court only used eight pages to evaluate the record and dispose of the Count I claim. (App. 66a-72a.) Most of those pages discuss cases and largely ignore extensive record of more than 4,373 pages. Although the district court paid lip service to Altemose's factual statement, it gave short shrift to the record in reaching the conclusion that the facts did not support a conspiracy. Contrary to petitioners' STATEMENT OF THE CASE, Petition at 2-7, the Third Circuit did not agree with the district court's analysis of the summary judgment record.

The Third Circuit canvassed the extensive summary judgment record for inferences of an antitrust conspiracy logically supported by the record, and concluded that the quantum of evidence was sufficient to overcome a motion for summary judgment. This Court has repeatedly ruled that the review of such fact canvassing is not the purpose of certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioners here seek to have this Court repeat the Third Circuit's painstaking review of a large summary judgment record and reach a different conclusion. For that reason alone, the petition should be denied.

The factual matrix of this case is distinctly dissimilar to those cases that petitioners contend the Third Circuit failed to follow. Each case attempting to establish an antitrust conspiracy from circumstantial evidence turns on the inferences logically supported by its peculiar facts. In *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 287-288 (1968), this Court concluded only that a parallel refusal to deal without more was insufficient to establish a conspiracy and overcome a properly supported Rule 56 motion. In the *Matsushita* case, a horizontal price fixing conspiracy in United States was alleged on the basis of circumstantial evidence of parallel business behavior in the United States and an actual price fixing agreement in Japan.

The type of conspiracy and facts offered by Altemose to prove the conspiracy among unions and non-union entities are totally dissimilar to those cases. As recognized by the Third Circuit, the record supports the inference that much more than innocent parallel behavior by contractors and unions is involved. Although petitioners try to belittle that evidence, they cannot blunt the simple fact that the evidence demonstrates activities consistent with a concert of action to obtain a result forbidden by the antitrust laws and wholly inconsistent with lawful independent activity. The prime example of such evidence is the Council's offer to Altemose to provide union

sub-contractors to work on Altemose's construction projects at lower, non-union contract prices if Altemose would sign a subcontractors' agreement despite prior, higher bids. (R. 502-503, 506-507, 531-532, 614, 659, 686-88, 1078, 1096-1109, 1113-1121.) Petitioners have either erroneously or intentionally choose to misstate the Third Circuit's opinion on this point by referring to its summary of the evidence (App. 10a). Petition at 22. However, it is quite clear that the Third Circuit recognized the real significance of the Council's offer to obtain lower priced unionized subcontractors. (App. 9a). This evidence is highly probative that the Council and the unionized contractors had unlawfully conspired and reinforces the other circumstantial evidence of direct and secondary pressure which petitioners choose to characterize as innocent, independent conduct brought to bear on Altemose by the Council.[5] Thus, the factual basis for the question under review in *Matsushita* is absent.

This evidence also satisfies the standard recently announced by this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, U.S. , 104 S.Ct. 1464 (1984), even if that standard applies to this case. *Monsanto,* unlike this case, involved a vertical price fixing conspiracy arising from the termination of a dealer following price complaints by another dealer to the manufacturer. This Court held that a finding of an antitrust conspiracy could not be based solely on the complaints of other dealers and the termination. Rather, "there must be evidence [direct or circumstantial] that tends to exclude the possibility of independent action by the manufacturer and distributor." 104 S.Ct. at 1473. Even under that "heightened" standard, the conspiracy in *Monsanto* was proved to the satisfaction of this Court on facts substantially less convincing of independent conduct than those recited by the

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5. The Council and unions' lack of unilateral, self-interest is illustrated by their total lack of interest in organizing Altemose's employees.

Third Circuit in this case. If *Monsanto* has any impact on this case, its standard is satisfied by Altemose's evidence. *Monsanto* relied upon the Third Circuit's opinion in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), which held that evidence of parallel business conduct was insufficient without more to prove an antitrust conspiracy. Clearly, the Third Circuit in this case concluded that the circumstantial evidence presented by Altemose involved much more than bare "conscious parallelism" by the Council, unions and non-labor entities. Such evidence, accompanied by actions contrary to the pecuniary interests of the unions, union contractors and other non-labor groups, as well as proof of motivation to enter, and actual entry into an agreement, is sufficient to infer a conspiracy under *Sweeney*. 637 F.2d at 114.

Neither *Monsanto* nor any other decision of this Court requires Altemose on a motion for summary judgment to establish conclusively that the co-conspirators were not acting independently. *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. at 288-89. All that is necessary, even if *Monsanto* is applicable, is evidence tending to show the absence of independent action.[6] Thus, petitioners' explanation of their activities in terms of independent, self-motivated conduct, does not warrant summary judgment. Whether one logical inference from a given set of facts is more plausible than another should not to be decided on summary judgment but by the ultimate trier of fact. While not referring to the *Monsanto* standard directly, the Third Circuit found logical inferences from significantly probative evidence tending to exclude the possibility of independent action by the petitioners and their co-conspirators and tending

6. Certiorari to construct the applicable limits of *Monsanto* may be inappropriate at this time since Congress has recently introduced legislation (S. 1445, 99th Congress, 1st Sess.) to overturn the holding of *Monsanto*. (*See* remarks of Senator Howard M. Metzenbaum (Ohio) in 131 Cong. Rec. S9579 (daily ed., July 16, 1985).

to establish a conscious commitment to a common scheme to violate the antitrust laws. Petitioners' suggestion of other logical inferences which may support independent action, does not support summary judgment but rather a trial on the merits. Since Altemose has raised genuine issues of fact about the existence of a common scheme, certiorari is unnecessary, and the case does not merit review by this Court.

II. THE THIRD CIRCUIT'S RULING AS TO THE COLLATERAL ESTOPPEL EFFECT OF THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD IS LEGALLY AND FACTUALLY INSIGNIFICANT, DOES NOT CONFLICT WITH OTHER CIRCUITS, AND OTHERWISE IS NOT AN IMPORTANT QUESTION TO JUSTIFY THE GRANT OF CERTIORARI.

Whether or not the doctrine of collateral estoppel precludes Altemose from proving the petitioner's lack of organization and recognitional objections in picketing during the *first four months* of *1975* is so unimportant in the context of the antitrust conspiracy presented by this case that review by this Court is not justified.

Altemose has presented evidence of an antitrust conspiracy that began in 1971. From that beginning in 1971, the Council eschewed any desire to organize Altemose's 150 permanent employees. In fact, it was made clear to Altemose that if it signed the subcontractors' agreement, those employees would have to be discharged. Relying on the decision of the National Labor Relations Board ("NLRB") that picketing by certain of the petitioners in the period January-April, 1975 had an organizational or recognitional purpose, *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO*, 222 NLRB 1276 (1976), *aff'd mem. sub nom., Altemose Construction Co. v. NLRB*, No. 76-1336,

93 LRRM 3085 (3d Cir. 1976),[7] the district court erroneously held that Altemose could not deny the organizational intent of the Council's conduct beginning in 1971. That conclusion contradicts the district court's admission that the petitioners denied any organizational objective in 1971. (App. 59a, n. 80.). The district court also ignored the NLRB's finding that after May, 1975, the Council's picketing and other activities had no organizational or recognitional objective. 222 NLRB at 1282.

Even if collateral estoppel precludes further proceedings on the limited issues decided by the NLRB, Altemose may still prove the lack of any organizational intent from 1971 to 1975 and after May, 1975. The preclusion sought by petitioners is simply inconsequential to Altemose's claim under Count II, and, as such, lacks sufficient importance to be reviewed by this Court.[8]

Moreover, the purported conflict between the circuits constructed by the petitioners does not exist. In *International Wire v. Local 38, International Brotherhood of Electrical Workers*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973), the Sixth Circuit reasoned that the doctrine of res judicata barred relitigation of an unfair labor practice charge in a case brought under 29 U.S.C. § 187, when the charging party failed to contend

7. As stated in the decision of the Administrative Law Judge adopted by the NLRB, the issue was

> "Whether [the Council] picketing of Altemose's construction sites from January 20 to April 23, 1975, with an object of obtaining a subcontractor agreement was violative of Section 8(b)(7)(C) of the Act." 222 NLRB at 1276.

See also Hirsch v. Building and Construction Trades Council of Philadelphia and Vicinity, 530 F.2d 298 (3d Cir. 1976), where the Court affirmed an injunction against allegedly recognitional picketing against Altemose in January, 1975 for more than thirty days.

8. The Council changed its stated objective due to the realization, confirmed by this Court's decision in *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), that its activities against Altemose in the absence of any "collective bargaining relationship" violated the antitrust laws.

that he had been denied a full and fair hearing before the NLRB. That case was declared to be "sound" by the Third Circuit in *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 503 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980). In *International Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125 (5th Cir. 1975), the Fifth Circuit applied collateral estoppel to bar relitigation of the charging party's admission of theft of his employer's confidential documents made during the NLRB proceeding.

Placed in their proper factual perspectives, neither case conflicts with the Third Circuit decision in this case. Altemose, as a charging party, had no control over the factual and legal issues tried before the Administrative Law Judge ("ALJ") and reviewed by the NLRB because, under 29 U.S.C. § 160, the General Counsel controlled the litigation. (App. 18a.) That control is illustrated by the *NLRB Case Handling Manual (Part One), Unfair Labor Practice Proceedings* at ¶ 10380.3, which instructs the trial attorney to control the prosecution of the case and to oppose, informally and formally, any efforts of the charging party which jeopardize that prosecution.[9] (Supp. App. 4a.) The limited role of the charging party in NLRB proceedings did not give Altemose "an adequate opportunity to litigate" which is the cornerstone of giving collateral estoppel effect to decisions of administrative agencies. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966).

The Third Circuit's decision in this case denied the application of collateral estoppel based on due process constraints since Altemose did not control its destiny in the NLRB proceedings. *Parklane Hosiery Co., Inc. v.*

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9. In this administrative proceeding, the positions of the General Counsel and Altemose were not the same, and General Counsel sought permission to contest Altemose's brief in support of its exceptions to the ruling of the ALJ. 222 NLRB at 1276, n. 1.

Shore, 439 U.S. 322, 331 (1979) (if procedural opportunities are unavailable in an administrative agency proceeding, collateral estoppel does not apply). In the absence of control over the NLRB case, Altemose cannot be precluded from proving the lack of organizational intent, even for the four months during 1975 at issue in that proceeding.

III. THE THIRD CIRCUIT'S REINSTATEMENT OF COUNT II IS BASED SOLELY ON THE FACTUAL MATRIX OF THAT CLAIM AND IS CONSISTENT WITH THIS COURT'S DECISION IN CONNELL.

Believing that the statutory antitrust exemption for labor organizations precludes trial on Count II,[10] the petitioners ask the Court to review a broad, general question which is really not presented by the unique pleading of Count II. The Third Circuit did not decide that question, and the factual predicate for the petitioners' argument is missing from the case. More important, to reach the question raised by petitioners would require the resolution of sharply disputed facts.

Count II alleges a combination of the Council and unions not acting in their self-interest but, instead, on behalf a favored group of employers with which they have collective bargaining agreements to create an exclusive enclave for union contractors in the geographic market. The major difference between Count I and II, as recognized by the Third Circuit, is the lack of participation by non-union entities in a conspiracy having secondary effects. (App. 11a.) That distinction, which turns on the unique pleading in this case, demonstrates that petitioners' question does not require this Court's attention.

Contrary to what petitioners suggest, the elimination of the non-union entities from the conspiracy among

10. The statutory sources of that exemption are identified in the Third Circuit's opinion. (App. 11a)

unions to engage in secondary activities does not invoke the protection of the statutory exemption. When unions do not act in their legitimate self-interest, they are subject to the restraints of the antitrust laws. *See United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

In *Allied International, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-80 (1st Cir. 1981), *aff'd*, 456 U.S. 212 (1982), the First Circuit, interpreting *Hutcheson* and *Pennington*, held that the statutory exemption only applies if a "two-prong" test is satisifed: (1) the union did not conspire with a non-labor group and (2) the purpose of the union's conduct was related to legitimate union goals. A specific anticompetitive object, like excluding Altemose and other non-union contractors from the relevant market, is not a legitimate union interest enjoying protection from the antitrust laws. *Sacramento Coca-Cola Bottling Co., Inc. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971). *See Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of North America v. Jewel Tea Co., Inc.*, 381 U.S. 676, 692-93 (1965) (union's efforts to protect one group of employers from competition is not exempt from the Sherman Act.)

The question raised for review by petitioners simply does not relate to the substance of Count II or its supporting facts and does not merit the review of this Court when considered in context.

In virtually every respect, Count II raises the same factual and legal issues resolved by this Court ten years ago in *Connell*. As noted by the Third Circuit, the same subcontractors' agreement which the Council sought to impose on Altemose, while disclaiming any interest in its employees, was considered in *Connell*. The Counsel's actions against Altemose occurred at the same time that the union in *Connell* picketed the contractor to force the

execution of the subcontractor's agreement. The only divergence of the facts supporting Count II and those in *Connell* is that Altemose (unlike the contractor in *Connell*) refused to sign the subcontractors' agreement, which the district court for some reason found sufficient to dismiss Count II. As the Third Circuit properly concluded, the refusal to sign an unlawful agreement does not deprive Altemose of the protection of the antitrust law or clothe the unions' activities to make Altemose sign with the shield of the statutory exemption. (App. 13a.) Following *Connell*, the Third Circuit found that union collusion with other contractors in the execution of subcontractors' agreement, although not part of the antitrust conspiracy alleged in Count II, was sufficient to take away the protection of the statutory exemption from the Council's unilateral unlawful activities against Altemose. That narrow holding is consistent with *Connell* under the facts of this case. No further review is required prior to trial.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT, ALTEMOSE CONSTRUCTION COMPANY.

STATUTES AND RULE INVOLVED

Declaratory Judgment Act

The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, provides in relevant part as follows:

§ 2201. *Creation of remedy*

(a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. . . .

§ 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Clayton Act

Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15, provides in relevant part as follows:

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly

made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, provides in relevant part as follows:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and

upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .) (In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

National Labor Relations Board
Casehandling Manual (Part One)
Unfair Labor Practice Proceedings (April 1975)

Paragraph 10380.3 of the Casehandling Manual, provides as follows:

Responsibility for Prosecution of Case: The attorney's position vis-a-vis the charging party is a delicate one. During the hearing, the charging party or counsel may make suggestions or give advice; or he may wish to embark along lines of his own. The trial attorney must determine which suggestions to adopt, which embarkations he should resist. He must be tactful but firm, keeping in mind that his is the primary responsibility for the prosecution of the case. Although the charging party is entitled to examine witnesses and to introduce or adduce additional evidence on his behalf, the trial attorney should oppose, either informally or, when necessary, by proper objection on the record, anything which in his sound discretion either will jeopardize the prosecution of the complaint or is unnecessarily cumulative.